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IN THE SUPREME COURT OF THE UNITED STATES

STEVEN DEWAYNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PRO BONO CRIMINAL ASSISTANCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF P-CAP AS *AMICUS CURIAE*

P-CAP, the Pro Bono Criminal Assistance Project, is a Virginia nonprofit corporation organized and staffed by student volunteers at the University of Virginia School of Law. P-CAP's interest as *amicus curiae* arises from our commitment to defending the rights of indigent defendants and prisoners. P-CAP members assist indigent defendants and prisoners and their attorneys by performing legal research, drafting habeas petitions and appellate briefs, and, pursuant to third-year practice rules, providing representation in bail, habeas corpus, and 42 U.S.C. § 1983 proceedings, and presenting oral arguments to the Court of Appeals of Virginia, the Supreme Court of Virginia, and the Court of Appeals for the Fourth Circuit. Faculty members of the

School of Law and Virginia attorneys in private practice provide supervision.

P-CAP receives its funding from University of Virginia student activities funds, the University of Virginia Law School Foundation, and private donations. P-CAP has no financial interest in the outcome of this case.

TABLE OF CONTENTS

Page

INTEREST OF P-CAP AS *AMICUS CURIAE* ii

TABLE OF AUTHORITIES v

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. POLICE GROPING AND MANIPULATION OF PERSONAL LUGGAGE ON A BUS OR OTHER COMMON CARRIER CONSTITUTES A SEARCH FOR PURPOSES OF THE FOURTH AMENDMENT. 4

A. Passengers On Buses And Other Common Carriers Exhibit Subjective Expectations Of Privacy With Respect To The Personal Effects Contained In Their Closed, Non-Transparent Luggage. 8

B. Bus Passengers' Expectations Of Privacy With Respect To The Personal Effects Contained In Their Closed, Non-Transparent Luggage Are Objectively Reasonable Expectations. 9

II. THE GOVERNMENT AGENT'S SEARCH OF PETITIONER BOND'S PERSONAL LUGGAGE WAS NOT CONSENSUAL. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

California v. Acevedo, 500 U.S. 565 (1991) 9

California v. Ciraolo, 476 U.S. 207 (1986) 4, 13

California v. Greenwood, 486 U.S. 35 (1988) 4, 8

Florida v. Bostick, 501 U.S. 429 (1991) 17, 18, 19

Katz v. United States, 389 U.S. 347 (1967) . . . . . *passim*

Michigan v. Chesternut, 486 U.S. 567 (1988) 18

Ohio v. Robinette, 519 U.S. 33 (1996) 16

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 15, 16

Smith v. Maryland, 442 U.S. 735 (1979) 4

United States v. Bond, 167 F.3d 225 (1999) 12, 16

United States v. Chadwick, 433 U.S. 1, 13 (1977) 9

United States v. Guzman, 75 F.3d 1090 (6th Cir. 1996), cert. denied, 117 S.Ct. 266 (1996) 10

United States v. Gwinn, 191 F.3d 874 (8th Cir. 1999) 10, 11

United States v. Harvey, 961 F.2d 1361 (8th Cir.), cert. denied, 506 U.S. 883 (1992) 11

United States v. McDonald, 100 F.3d 1320 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997) 10

United States v. Mendenhall, 446 U.S. 544 (1980) 16

United States v. Nicholson, 144 F.3d 632 (10th Cir. 1998) 10

United States v. Place, 462 U.S. 696, 707 (1983) 9

STATUTES

18 U.S.C. §§ 3121-3126 6

INTRODUCTION

This brief is filed pursuant to Rule 37 of the Rules of this honorable Court. Letters of consent from both parties accompany this filing.

SUMMARY OF ARGUMENT

Police groping and manipulation of personal luggage on a bus or other common carrier constitutes a search for purposes of the Fourth Amendment because passengers exhibit subjective expectations of privacy in the contents of their luggage and society is prepared to recognize these expectations as reasonable. When police groped and manipulated Petitioner Bond's bag, they did not merely touch the exterior of his bag. Rather, they actually felt the contents of his bag in a manner that could reveal the number, shape, and character of the items, perhaps very personal items, inside the bag. This manner of handling Bond's luggage was far more intrusive than the foreseeable handling by fellow passengers as they stow and retrieve their own luggage. Since the groping and manipulation by police is a much

greater intrusion than the touching by fellow passengers to which Bond knowingly exposed his luggage, this governmental groping constitutes a search for purposes of the Fourth Amendment.

The search of Bond's bag was not consensual because his purported consent was not voluntarily given. The police sought Bond's consent to search under coercive conditions where he was not free to leave due to the governmental activity of inspecting bus passengers' immigration status. A reasonable person in Bond's position would not have considered himself free to decline the agent's request to search his bag given that the agent's groping and manipulation of his bag conveyed the message that Bond lacked the authority to prevent the agent from ascertaining the contents of his bag. In addition, Bond was not advised of his right to refuse consent. Considering the totality of the circumstances surrounding Bond's encounter with the immigration agent, Bond's purported consent was not voluntary.

ARGUMENT

I. POLICE GROPING AND MANIPULATION OF PERSONAL LUGGAGE ON A BUS OR OTHER COMMON CARRIER CONSTITUTES A SEARCH FOR PURPOSES OF THE FOURTH AMENDMENT.

Government activity constitutes a "search" implicating Fourth Amendment protection when the Government intrudes upon a person who has exhibited a subjective expectation of privacy that society is prepared to recognize as reasonable. See, e.g., Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This Court recognized in Katz that "what [one] seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." 389 U.S. at 351 (emphasis added) (holding that a person's privacy interest in the contents of phone calls from a public phone booth is subject to Fourth Amendment protection).

Although this Court has adopted Justice Harlan's test for determining the scope of privacy interests that are subject to Fourth Amendment protection, the Court has consistently

applied the Katz standard in a manner that is inconsistent with the holding of Katz. Since Katz, this Court has consistently denied Fourth Amendment protection based on the mere possibility that public access could interfere with individuals' privacy interests. See, e.g., California v. Greenwood, 486 U.S. 35, 39-40 (1988) (holding that when police open opaque, sealed garbage bags on the curb outside a home and rummage to find evidence of what the residents are doing in the privacy of their home, the police do not thereby conduct a "search" because the garbage bags are "readily accessible to animals, children, scavengers, snoops, and other members of the public."); California v. Ciraolo, 476 U.S. 207 (1986) (holding that the Government's naked-eye aerial surveillance of the fenced-in curtilage of a person's home is not a "search" because people flying overhead on commercial planes might observe what one does in the privacy of one's backyard); Smith v. Maryland, 442 U.S. 735 (1979) (holding that police use of a "pen register" surveillance device to identify all the phone numbers called

from one's home is not a "search" because the phone company has access to this technology and uses it for billing purposes). This line of cases is based on a misapplication of the majority's explanation in Katz that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351. The majority in Katz immediately clarified, "[b]ut *what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected*." Id. (emphasis added). The Court's holding is properly understood as recognizing that a subjective expectation of privacy is a necessary but not sufficient condition for Fourth Amendment protection. However, the reference in Katz to what one "knowingly exposes to the public" has been consistently taken out of context and misapplied to deny Fourth Amendment protection based on the mere possibility of public exposure. Notwithstanding one's exhibited subjective expectations of privacy with respect to one's discarded personal items, one's activities in the curtilage of

one's home, and the numbers one calls from one's home phone, this Court concluded that these privacy interests are not subject to Fourth Amendment protection because one engages in these activities with knowledge of the possibility of public exposure, however improbable. However, as Justice Harlan recognized in his Katz concurrence, individuals who exhibit subjective expectations of privacy are entitled to Fourth Amendment protection provided only that society would recognize their expectations of privacy as reasonable. The possibility that particular activities may be exposed to public observation does not imply that society is unwilling to recognize as reasonable individuals' subjective expectations of privacy with respect to these activities. Indeed, by providing legislative protection against governmental use of "pen register" surveillance,[1] Congress demonstrated our society's willingness to recognize individual subjective expectations of privacy as reasonable

[1] See 18 U.S.C. §§ 3121-3126.

notwithstanding individuals' purported knowledge of the possibility of public exposure.

This case presents this honorable Court with the opportunity to reaffirm the holding of Katz and to reinvigorate the Fourth Amendment's protection against unreasonable governmental intrusions. In keeping with the theory of Katz, this Court should consider whether the risk and degree of public exposure through the expected touching of one's luggage by other passengers is so great that police groping and manipulation of personal luggage on common carriers becomes unintrusive. If such groping and manipulation by police is a greater intrusion than the touching by fellow passengers to which the Petitioner knowingly exposed his luggage, then the Fourth Amendment's reasonableness requirement should regulate that intrusion.

When police officers or other government agents grope or manipulate the personal luggage of passengers on buses and other common carriers without warrant, probable

cause, reasonable suspicion, or consent, the Government intrudes upon the passengers' exhibited subjective expectations of privacy which society is prepared to recognize as reasonable.

A. Passengers On Buses And Other Common Carriers Exhibit Subjective Expectations Of Privacy With Respect To The Personal Effects Contained In Their Closed, Non-Transparent Luggage.

This Court has acknowledged that one exhibits a subjective expectation of privacy with respect to particular items that one places in a sealed, opaque container. See California v. Greenwood, 486 U.S. at 39. In Greenwood, this Court recognized that individuals may manifest a subjective expectation of privacy in their discarded personal items by placing them in opaque, sealed garbage bags. Id. Similarly, Petitioner Bond exhibited a subjective expectation of privacy in the personal effects that he placed in a closed, non-transparent bag during travel. In addition, Bond stored his bag in the overhead compartment directly above his seat, Id., further manifesting his intent to keep the contents of his

bag private. The placement of his bag in a compartment that was accessible to other passengers did not defeat his expectation of privacy because the foreseeable touching of his bag by other passengers did not include groping and manipulating his bag in a manner designed to reveal its contents.

B. Bus Passengers' Expectations Of Privacy With Respect To The Personal Effects Contained In Their Closed, Non-Transparent Luggage Are Objectively Reasonable Expectations.

It is well established that travelers have legitimate expectations of privacy in their luggage, which is "intended as a repository of personal effects." United States v. Chadwick, 433 U.S. 1, 13 (1977), overruled in part, California v. Acevedo, 500 U.S. 565 (1991); See also United States v. Place, 462 U.S. 696, 707 (1983) (affirming that a person's privacy interest in the contents of personal luggage is protected by the Fourth Amendment). Police groping and manipulation of luggage on common carriers infringes passengers' privacy interests in the contents of their luggage.

Since the government agent manipulated Bond's bag in a manner that he did not reasonably expect from other passengers, the agent conducted a search within the meaning of the Fourth Amendment. See United States v. Gwinn, 191 F.3d 874 (8th Cir. 1999); United States v. Nicholson, 144 F.3d 632, 639 (10th Cir. 1998).

Some courts have ruled that the intrusive police practice of groping and manipulating personal luggage on common carriers with no warrant, consent, probable cause, or reasonable suspicion does not constitute a "search" because an individual does not have a reasonable expectation of privacy in the *exterior* of his luggage. See, e.g., United States v. McDonald, 100 F.3d 1320, 1326 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997); United States v. Guzman, 75 F.3d 1090, 1095 (6th Cir. 1996), cert. denied, 117 S.Ct. 266 (1996). These courts failed to appreciate that when police grope and manipulate luggage in a manner designed to detect contraband, they do not merely touch and feel the luggage exterior. Rather, the police are actually

feeling the personal effects contained inside the luggage. In the present case, the agent groped and manipulated Bond's luggage to such an extent that he actually felt the shape of the objects inside. The tactile observations made by means of groping and manipulating luggage are clearly distinguished from the observations that can be made by the mere touching of a bag's exterior.

The tactile inspection in the present case is also distinguished from canine sniffs which cause a very limited intrusion in terms of the manner in which information is obtained, and reveal only whether an illegal substance is present. See Place, 462 U.S. at 707; United States v. Harvey, 961 F.2d 1361 (8th Cir.), cert. denied, 506 U.S. 883 (1992). In contrast, groping and manipulating a bag reveals the contents in which the owner has a legitimate expectation of privacy. As the Eighth Circuit observed, "extensive tactile examination of a soft-sided bag's exterior by an officer may reveal almost as much information as opening the bag itself, such as information about the number, shape, and character

of the items, perhaps very personal items, inside the bag." United States v. Gwinn, 191 F.3d 874, __ (8th Cir. 1999).

In the decision below, the Court of Appeals recited and misapplied the language from Katz, "what a person knowingly exposes to the publi . . . is not a subject of Fourth Amendment protection." United States v. Bond, 167 F.3d 225, 226 (1999), quoting Katz, 389 U.S. at 347. The court noted that Bond stored his bag in the overhead luggage bin when it was reasonably foreseeable that his bag would be handled by other passengers as they stowed and retrieved their own luggage. Id. at 226. The court reasoned that since Bond knowingly exposed his bag to the public, he had no reasonable expectation that his bag would not be manipulated by others. Id.

Notwithstanding the fact that the government agent manipulated the bag in a manner calculated to detect contraband -- a manner of handling different from the foreseeable handling by other passengers -- the court held that the government agent's manner of handling Bond's bag

was irrelevant for Fourth Amendment purposes. Id. at 227. The court supported its conclusion by applying this Court's finding in Ciraolo that it was irrelevant that the government's aerial surveillance of the defendant's backyard was conducted by officers who were trained to recognize marijuana and was directed at identifying marijuana. Id. at 227, citing Ciraolo, 476 U.S. at 213. This reliance on Ciraolo is misplaced given this Court's reasons for disregarding the officers' training and purpose as irrelevant. The majority in Ciraolo considered these facts irrelevant because the nature of the officers' naked-eye observations was held to be *the same* as the observations that could be made by any member of the public who glanced down while flying in the same airspace. See Ciraolo, 476 U.S. at 213-14. In the present case, however, the nature of the agent's observations was not the same as the observations that Bond could reasonably expect his fellow passengers to make. The agent's groping and manipulation of Bond's bag, calculated to ascertain its contents, enabled the agent to make tactile

observations of the personal effects in Bond's luggage that could not be made by fellow passengers unless their touching of Bond's bag went beyond what was necessary to stow and retrieve their own luggage.

Even if the expected touching of one's luggage by other passengers might enable them to ascertain the contents of one's luggage, this possibility of public exposure is not sufficient to rule out Fourth Amendment protection of one's privacy interest in the personal effects contained in one's luggage. As the majority in Katz clarified, "*what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.*" 389 U.S. at 351. (emphasis added). Given the unlikelihood that the legitimate handling of one's luggage by other passengers will enable them to ascertain its contents, the deliberate groping and manipulation of one's personal luggage by police is not rendered reasonable merely because of the expectation that other passengers will move one's luggage when stowing or retrieving their own. Since the groping and manipulation by

police is a greater intrusion than the touching by fellow passengers to which Bond knowingly exposed his luggage, this governmental groping constitutes a search for purposes of the Fourth Amendment.

The agent's groping and manipulation of passengers' bags is analogous to the manipulations that one might expect from a trained camera thief. Bond's subjective expectation that his personal effects would not be exposed to the intrusive tactile observations of a brazen thief -- or curious constable -- is a reasonable expectation that merits Fourth Amendment protection. Persons who travel by means of public transit are entitled to the protection of their right to be secure in their personal effects against such unreasonable governmental searches.

II. THE GOVERNMENT AGENT'S SEARCH OF PETITIONER BOND'S PERSONAL LUGGAGE WAS NOT CONSENSUAL.

Searches conducted without a warrant are *per se* unreasonable unless a valid exception to the warrant requirement is applicable. Schneckloth v. Bustamonte, 412

U.S. 218, 219 (1973). Voluntary consent to a search is such an exception. Id. The Government has the burden of proving that a defendant's purported consent was voluntary. United States v. Mendenhall, 446 U.S. 544, 557 (1980). Although the court below stated that "Bond consented to the search of the inside of his bag," United States v. Bond, 167 F.3d at 226, the court does not state the basis for this conclusion. Since this conclusion is not supported by the record, it should be rejected as clearly erroneous.

To determine whether consent to search was freely and voluntarily given, the totality of the circumstances surrounding the consent must be examined. See Schneckloth v. Bustamonte, 412 U.S. at 227. See also Ohio v. Robinette, 519 U.S. 33 (1996). Unlike passengers on a bus during a typical police sweep, Petitioner Bond was on a bus that was stopped for an immigration inspection at a permanent Border Patrol checkpoint in Texas. United States v. Bond, 167 F.3d at 226. The government agent boarded the bus and checked the passengers' immigration status as he moved toward the

rear of the bus. Id. Bond and his fellow passengers were not at liberty to leave the bus or to otherwise terminate their encounter with the agent because the legality of their very presence in the country was under investigation. Although the agent had already checked Bond's immigration status before he manipulated luggage and requested consent to search Bond's bag, Id., the agent's groping and manipulation of luggage could have been reasonably construed as evidence that the agent was not yet satisfied that all of the passengers were lawfully in the United States. Therefore, since Bond's lack of freedom to leave was the result of police activity, Bond's person was seized. See Florida v. Bostick, 501 U.S. 429, 436 (1991). The seizure of one's person is an inherently coercive condition. In addition to being seized, Bond also witnessed the agent's groping and manipulation of his luggage without his consent. This display of authority was also a coercive condition. Given the additional fact that Bond was not advised of his right to refuse consent to the

search, the record does not support a finding that Bond's consent to the search was voluntary.

Even if the immigration stop did not by its nature constitute a seizure, Bond's purported consent was not voluntary because a reasonable person in his position would not feel free to decline the agent's request or otherwise terminate the encounter. See Bostick, 501 U.S. at 436. According to this Court,

> the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."

Id. at 437, quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988). As this Court clarified,

> no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage -- *so long as the officers do not convey a message that compliance with their requests is required.*

Bostick, 501 U.S. at 437 (emphasis added).

The government agent in the present case did convey the message to Bond that his compliance with their request to search his bag was required. This message was conveyed when the agent groped and manipulated Bond's bag in a manner that was likely to reveal the number, shape, and character of the items, perhaps very personal items, inside his bag. Since this conduct by the agent was done without Bond's consent, it communicated to Bond that he lacked the authority to prevent the agent from ascertaining the contents of his bag. Considering the totality of the circumstances surrounding Bond's encounter with the immigration agent, Bond's purported consent was not voluntary.

CONCLUSION

For the foregoing reasons, we respectfully urge this honorable Court to reverse the decision of the Court of Appeals for the Fifth Circuit affirming the denial of Petitioner Bond's suppression motion and to vacate Bond's convictions.

Respectfully submitted,

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